IN THE
SUPREME COURT OF THE UNITED STATES

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ALEXANDER L. STEVAS
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FRANK B. JAMES ET AL
Petitioners

v. No. 83-623

JAMES G. WATT ET AL
Respondents

PETITIONERS' MOTION TO STRIKE APPEARANCES OF HENRY J. SOCKBESON, ARLINDA LOCKLEAR AND NATIVE AMERICAN RIGHTS FUND FOR GAY HEAD TRIBE

Petitioners move the Court strike the appearances of Henry J. Sockbeson, Arlinda Locklear and Native American Rights Fund (NARF) for the Gay Head Tribe.

Although, in petitioners' view, the Gay Head Tribe is a nonterminated federal tribe and exists as a conceptual entity and juristic person, it has no functioning tribal organization, having been dispossessed by Massachusetts in 1869 and 1870 (albeit wrongfully) of both its land base and its tribal povers. See 1869 Mass. Acts c. 463; 1870 Mass. Acts c. 213.

It is true there is a 1974 case (Gay Head I), pending in the Massachusetts Federal District Court, brought by the so-called Gay Head Tribal Council, Inc. But in petitioners' view, not only the asserted claim and inherent structure of Gay Head I were legally insufficient, the case was going nowhere.

So in December 1981, having filed, then withdrawn intervention in Gay Head I, petitioners brought instant separate action (Gay Head II) on the theory that 102 Gay Head members-descendants individually and as a class, seeking tribal and derivative status declarations on the Gay Head Tribe's entire claim, was the legal equivalent of a tribal action. See UNITED STATES v. ASHTON, 170 F 509, 511 (WD Wash 1909); STURDEVANT v. WILBER, 456 F Supp 428 (ED Wis 1978), 464 F Supp 327 (ED Wis 1979).

And because a declaratory proceeding must include all parties affected, along with the several public and private class defendants, petitioners joined the Gay Head Tribe, the so-called Gay Head Tribal Council, Inc. and the so-called Gay Head leaders Gladys and Donald Widdiss.

Although their theory and joining the Tribe as a defendant were challenged, petitioners explained to the First Circuit:

> "'The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation.' FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1971 UNM reprint of 1942 ed.), p. 183.
>
> "So analogizing to the law of corporations, the Gay Head Tribe is not in reality a defendant in this action:
>
> 'Simply stated, in a derivative suit a minority shareholder places himself in the shoes of the corporation to enforce the corporate right, and the interests of the plaintiff-shareholder and the corporate defendant become merged.
> * * *
> Conceptually, the corporation, although nominally a defendant, is in actuality a party plaintiff because a successful suit will ostensibly benefit the corporation.' IN RE KINSEY, 51 LW 2561, 2562 (Ore Sup Ct

In fact, after District Court dismissal, hoping to clear up any conceptual problem, petitioners moved to amend by naming the Tribe and adding the Wampanoag Nation as plaintiffs.

In addition, petitioners found a recent Indian case fully supporting their theory -- holding that where there is no functioning tribal organization, "(i)t was ...not only appropriate, but necessary...the...suit be brought by individual Indians." SHORT v. UNITED STATES, 661 F2d 150, 155 (Ct Cl 1981)(emphasis added).

Accordingly, petitioners believe their Gay Head II action is legally sound and NARF's Gay Head I action is legally deficient.

Furthermore, contrary to the representation of NARF and their Attorneys Sockbeson and Locklear, the Wampanoag Tribal Council of Gay Head, Inc. is not the "duly organized and elected government" of the Gay Head Tribe.

Rather, this Massachusetts non-profit membership corporation (herein 'State corporation') was formed in 1972 as a Gay Head Indian historical and cultural society. And even had the incorporators or Massachusetts intended or attempted more, a State cannot create or empower a tribal governing body. UNITED STATES v. PAWNEE BUSINESS COUNCIL, 382 F Supp 54 (ND Okla 1974).

As stated, in 1974, on the advice of NARF's New England Attorneys Tureen and Margolin, the 'state corporation' sued the Town of Gay Head for return of 230 acres of tribal common land. WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC. v. TOWN OF GAY HEAD, CA No. 74-5826-Mc (Gay Head I).

Attorney Douglas Randall, Special Town Counsel for Gay Head in 1975 and now, immediately challenged the 'state corporation's' legal capacity:

> "The defendants move the Court...(t)o dismiss the action on the ground that the Court lacks jurisdiction over the party plaintiff in that said plaintiff lacks standing to bring this suit because the Wampanoag Tribal Council of Gay Head neither represents nor is the same as the Wampanoag Tribe, and further that the Wampanoag Tribal Council, Inc. is not the legal successor to the Wampanoag Tribe's rights." TOWN OF GAY HEAD'S MOTION TO DISMISS, CA No. 74-5826-Mc (Gay Head I), filed January 23, 1975.

> "If suit has been brought by the council as a corporate entity, the laws of the state where it was incorporated determine its capacity to sue. ...Defendants assert that nowhere in the pleadings is there any evidence as to how the corporation gained its authority to represent all Wampanoag Indians, nor are there any facts which indicate that plaintiff corporation has any legal rights which have been infringed." DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO DISMISS, CA No. 74-5826-Mc, filed April 25, 1975, pp. 13-14.

> "The complaint in paragraph 4 refers to the plaintiff as the Wampanoag Tribal Council of Gay Head, Inc., while the caption lists plaintiff as the Wampanoag Tribal Council of Gay Head; the distinction is of major importance. If the former case is correct, there is nothing to indicate how the corporation (whether business or charitable) succeeded to the rights of the Wampanoag Indians or Wampanoag Nation, and if or how said members of that tribe gave to the corporation authority to bring this suit on behalf of all said Indians or Indian nation. The defendants know of no federal rights in said corporation." Id. at 3.

Interestingly, NARF Attorneys Tureen and Margolin agreed:

> "Defendant further argues that if the Council is incorporated, its capacity to sue is to be determined by Massachusetts law. For purposes of the motion to dismiss, this proposition may be conceded." PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT AND MOTION TO DISMISS, CA No. 74-5826-Mc, filed in 1975, p. 7 (emphasis added).

In fact, NARF's lawyers sidestepped the state corporation's legal incapacity by adding the Gay Head Tribe as plaintiff. And there Gay Head I rested for eight years, without action except two allowed defendant interventions, until certain non-Indians living on the Gay Head reservation recently instigated the current push to settle Gay Head I as part of an effort to moot petitioners' case, Gay Head II.

Acceding to this non-Indian pressure, NARF attorneys Tureen and Margolin prepared a Joint Memorandum of Agreement by and between the 'state corporation', the Town of Gay Head, the Commonwealth of Massachusetts and the non-Indian Gay Head Taxpayers Association.

Quite simply, one of petitioners' fundamental positions is this --

If the principal parties to Gay Head I, namely, the 'state corporation' and the Town, agreed in 1975 the 'state corporation' lacked legal capacity to sue on behalf of the Gay Head Tribe and/or the Gay Head Wampanoags, then a fortiori, the 'state corporation' lacks legal capacity in 1983 to settle Gay Head I on behalf of the Gay Head Tribe and/or the Gay Head Wampanoags.

Yet this is just what NARF proposes the 'state corporation' do in concert with its three co-signers:

> "(T)he Tribal Council on behalf of all persons of Indian descent hereby agree that this settlement is in full compensation for the claims so extinguished." JOINT MEMORANDUM, p. 6 (emphasis added).

> "(T)he provisions...are...intended to extinguish claims made by any Indians, whether advanced by individuals, groups or tribes." Id. (emphasis added).

Also in NARF's draft settlement, the 'state corporation' disclaims the very existence of the Gay Head Tribe:

> "Neither the provisions of paragraph 1 nor this Joint Memorandum of Understanding as a whole shall be deemed an admission of the existence of a tribe...." JOINT MEMORANDUM, p. 6.

Yet in their brief to this Court, NARF and its Washington attorneys Sockbeson and Locklear purport to appear and speak for the Gay Head Tribe, the very tribe NARF's New England attorneys Tureen and Margolin agree the 'state corporation' should disclaim.

In other words, if it helps settle Gay Head I, NARF is willing to disclaim the Gay Head Tribe. But if it helps scuttle petitioners' Gay Head II case, NARF fully embraces the Gay Head Tribe.

Countering these machinations, even though their separate suit implied withdrawal, petitioners expressly withdrew from the 'state corporation' and invoked Massachusetts'

statutory bar against unauthorized name use and privacy invasion. See MGL c. 214, secs. 1 and 3A. Although the NARF and other 'settlement' attorneys removed petitioners' State action to the federal district Judge handling Gay Head I, petitioners have gone to the First Circuit for injunctive and preventive relief.

Now, getting back to the Settlement Agreement --

Before signing, the Widdisses needed the appearance of Indian approval without revealing the settlement terms to the press or petitioners ahead of time.

Although instant petitioners estimate there are two to three thousand members-descendants of the Gay Head Tribe, there is no Tribal Roll. But the 'state corporation' and the Widdisses have created a 350 corporate member voting list.

So on or about 14 October 1983, the Widdisses quietly mailed ballots to these 350 state corporation members, instructing their return envelope be postmarked no later than 26 October 1983.

Because the ballots were mailed without prior notice, there was no chance for any educational process, thereby tainting the vote. MORRIS v. WATT, 640 F2d 404, 415 (DC Cir 1981)(Indian referendum "procedures must be 'designed to make the vote a meaningful and fully informed one.'"), quoting HARJO v. KLEPPE, 420 F Supp 1110 (DDC 1976), aff'd sub. nom. HARJO v. ANDRUS, 581 F2d 949 (DC Cir 1978).

And because the Widdisses enclosed partisan material with each ballot urging a "favorable" or "yes" vote, the vote was further tainted.

On Saturday, 5 November 1983, the Widdisses announced NARF's proposed settlement was "approved" by a vote of 169 to 29. An unknown number of ballots were "disqualified."

And it is these 169 tainted corporate member votes, less than half the Widdisses' 'special list', which NARF and their Washington lawyers would have this Court consider a 'clean' vote -- a 'tribal' vote -- an 'overwhelming' vote:

> "After careful vote the Tribe overwhelmingly approved the settlement." (NARF Opp.Br. 11)(emphasis added).

Even further, NARF lawyers Sockbeson and Locklear tell this Court, that petitioners' carefully structured individual and class action (Gay Head II), brought on behalf of the entire two to three thousand Gay Head Tribal membership, and presenting the Tribe's entire cause of action, should be disregarded as the effort of a "dissident minority". Id.

And finally NARF urges,

> Because "(t)he Tribe has spoken...this Court must not disturb (the Tribe's) determination." Id. (emphasis added).

To make sure NARF's national leadership knew what their attorneys were up to, petitioners Frank James and Thelma Weissberg with instant counsel met with NARF's Steering Committe in Washington, D. C. last month and discussed the entire matter. But the Committee decided NARF had no control over their attorneys once assigned to

an Indian client. So there was nothing they could do.

Briefly, in petitioners' view, NARF's proposed Gay Head 'settlement package' consisting of 37 pages of legal gobbledygook and word mirage, most certainly is not Indian oriented. It masks a tax-free sweetheart land deal of substantial proportions. It leaves non-Indian control of the Gay Head Reservation intact. Token say over the Gay Head common lands is given, not to the Tribe, but to the 'state corporation', and under full state and local control. All Gay Head tribal and individual Indian claims are to be extinguished, including Indian control over their 3400 acre homeland and their vital fishing and other appurtenant rights. And Indian access to their beaches and in some cases even to their own lots, will be forever cut off.

In sum, in petitioners' view, the 'state corporation' and the two Widdisses, with the advice and assistance of NARF's New England and Washington lawyers, have together broken every rule and used any device in their effort to settle Gay Head I and scuttle Gay Head II.

But this is not the first time NARF's motives, loyalties, tactics and ethics have been questioned.

In this connection, petitioners ask this Court review a most thoughtful 1980 article by a leading Native American publication entitled "N.A.R.F. ETHICS QUESTIONED", attached hereto and made a part hereof.

Respectfully submitted,

5 December 1983

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N.A.R.F.'s Ethics Questioned

The Native American Rights Fund (NARF) is the largest and probably the most famous law firm in the area of Native affairs. NARF lawyers have been the subject of major articles in a number of nationally-distributed news magazines, including *Parade*, a Sunday supplement in newspapers across the country. NARF is known to the public as a privately-funded public interest type law firm which specializes in Native peoples' causes and which gets involved in litigation in such politically sensitive areas as Native water rights, hunting and fishing issues and, among others, land claims.

In fact, NARF is the law firm which has handled (and is handling) such legal cases as the Maine (Passamaquoddy, Penobscot and Maliseet) land claim, and the Oneida and Catawba land claims. All in all, NARF is involved in most of the highly-publicized and deeply controversial Indian litigation cases presently in progress in the United States. What is not widely known about NARF is that its programs, including its land claims litigation programs, are largely financed by the federal government, and that NARF has not been telling its clients about that source of funding. NARF has also played a major role in the creation and operation of energy development organizations such as the Council of Energy Resource Tribes (CERT), and NARF has what could be described as a "revolving door" personnel program relative to the Interior Department's Solicitor's Office.

NARF began its work as an organization which was largely privately funded. A review of NARF's annual reports shows that seven years ago, less than a quarter of their budget came from federal sources. It can be argued that other public interest type law firms which are similar to NARF also take federal dollars, but as a rule, those organizations make political decisions to avoid that source of funding because the federal government is often a direct or an indirect adversary to the rights of their clients. For example, organizations such as the American Civil Liberties Union (ACLU), the Lawyers' Guild, the highly prestigious NAACP Legal Defense Program, and MALDEF (the Mexican-American legal defense program) have avoided excessive dependence on federal funding especially in areas concerning litigation. In other words, when those organizations do accept federal funding, that funding represents a low percentage of their overall operating budget and is not used in litigation. The theory which is most often heard explaining that policy on behalf of public interest legal organizations is that it is unwise to become financially dependent on an adversary which may then have the power to withdraw its support in the middle of crucial litigation matters.

The trend at NARF has been to ignore that principle. NARF's funding sources figures from 1973 to 1978 (we don't have figures for 1975) show a distinct pattern of increasing federal funding:

	Private Foundations	Govt.	Gen'l Public
1973	72%	23%	5%
1974	76	17	7
1976	58	24.5	11
1977	54	35	8
1978	43.5	43.8	9

In 1978, the single largest source of funds for NARF was the federal government. NARF's 1979 report will show 59% of their budget was derived from federal sources that year. Private funding sources speculate that the percentage of NARF's budget which is derived from federal sources could go even higher in 1980. An increasing amount of federal dollars are being used by NARF for litigation purposes.

In 1977 a controversy around NARF arose in the public media because of allegations that federal funds were being used for litigation of the Maine land claims. Tom Fredericks, who was then Director of NARF, told the press that no federal monies were being used to maintain the Indian land claims litigations in the Northeast. He was apparently telling the truth at the time, but subsequent NARF reports to their federal funding agencies indicate that federal monies have been used for litigation purposes in 1978 and 1979 in land claims litigation work in the Oneida and the Maine cases.

NARF attorney Tom Tureen, the man who heads the Indian side of the legal machinery in the Maine land claim case, seems to be confused on that issue. Recently, he told several Penobscot people in Maine that there are no federal monies involved in any litigation proceedings in the Maine case. He has refused to tell at least one local reporter anything at all about funding. The fact is that NARF's 1978 report to a federal funding agency shows that part of Tureen's salary was derived from federal funds, and that the hours that were claimed were attributed to Maine land claims work.

In a Washington, D.C. interview on March 14, 1980, AKWESASNE NOTES asked current NARF Director John Echohawk to tell us just how much of NARF's present budget comes from federal sources. He said, "about one-half, maybe a little more." We then asked him how he justified that level of federal funding in light of the fact that similar organizations feel it is an unwise policy for law firms whose clients have interests which can be defined as adverse to the interests of the federal government to become dependent on federal monies. He replied that NARF has thought about it, and has decided that federal monies do not interfere with or influence their work, and if those monies did interfere with their work, NARF would reject the monies. He further indicated that he felt that acceptance of federal monies by a law firm was a matter of policy decision, style, and opinion.

We then asked Mr. Echohawk if NARF informs its clients that NARF receives litigation monies from the federal government, and that the federal government is a party which has interests which are adverse to the claims of Indian peoples. His reply: **"No, we don't. If they ask, then we tell them. But we don't make it a policy to tell them about federal sources of funding."**

He went on to say that the fact that NARF accepts federal funding is public information and appears in NARF's annual report, which is "widely distributed." But NARF's annual reports don't show specifically what the federal monies are used for, and certainly don't indicate that the federal government directly funds litigation.

Mr. Echohawk went on at some length defending NARF's policy of accepting federal funds for litigation purposes. NARF's decision to accept federal funds for those purposes can be argued as a political decision. The fact that the Director of NARF admits that his law firm does not inform his clients about the source of litigation funds is a separate issue.

The canons of ethics of the legal profession require lawyers to tell their clients about any compensation that they receive from anyone other than the client. Those same canons virtually forbid an attorney to accept compensation from any source with an adverse interest to the client, particularly when that source is in a position to exercize strong social, economic, political or other influence, either subtly or directly, against the lawyer(s). A lawyer must exercise extreme care in those situations where the source of compensation other than the client might influence the attorney's judgment even in subtle ways. The principle expressed by the canon of ethics is that the client must approve of that source of funding. The client, not the lawyer, must decide whether or not the source of compensation might effect the lawyer's judgment in any way.

The federal government would appear to be manifestly in a position to exercize social, economic and political influence over NARF's attorneys. Mr. Echohawk's assertion that NARF lawyers faithfully represent their clients and that therefore it is not necessary that they tell their clients about federal sources of compensation in litigation matters is a view which appears to be in absolute conflict with the canons of ethics which govern the conduct of attorneys. The canons of ethics are specifically designed to allow the client to make that decision, not the lawyer.

Because of its dependency on federal funding, NARF can be seen to be in no position to be a vigorous advocate in support of Indian rights. A lawyer should be

in a position to be an unfettered advocate for a client's interests. Even in cases where there are no visible "strings" attached to federal dollars, it can readily be seen that a law firm dependent on federal sources of funding is limited to doing that work which the federal government is willing to pay for. Once an organization becomes *absolutely* dependent on federal monies, many decisions must be made on the basis of consideration of what will or will not attract federal dollars.

This will be true regardless of NARF's people's intentions. No one would believe that federal funding would have no influence on the kinds of strategies they will be able to take in order to defend Indian peoples' rights. Even if they are capable people with good will, they are not in a position to be unfettered advocates of Indian rights.

NARF's personnel history would suggest that some of NARF's people may be vulnerable to the "subtle influences" of the federal government in terms of their professional, political, and social lives. Some of NARF's staff have worked very closely with the Interior Department's Indian affairs people. NARF Attorney Larry Ashenbrenner is a former Assistant Solicitor for Indian Affairs with the Interior Department. Staff Attorney Don Miller used to be a lawyer with the Office of the Solicitor, Division of Indian Affairs of the Department of the Interior. Susan Harjo, who is on the staff but is not an attorney, only last year left her job as Special Assistant to Forrest Gerard, then-Undersecretary of Interior for Indian Affairs. She had also worked at NARF before she took the job in Gerard's office.

The man who preceded John Echohawk as Director of NARF, Tom Fredericks, went from NARF to become Associate Solicitor for Indian Affairs. As Associate Solicitor of Indian Affairs he expressed the position that by virtue of the Doctrine of Discovery, Indian people lost all title to their lands upon the "discovery" of the Americas by Europeans and that Indian people retain only such rights as the United States cares to grant them. As of this writing, Mr. Fredericks is working as a consultant in Denver, but he is presently the most-often mentioned candidate for the job Forrest Gerard left as Undersecretary of Interior.

AKWESASNE NOTES asked Mr. Echohawk about this policy of hiring not simply government lawyers for a law firm expressly created to defend Native peoples' rights, but actually hiring exactly those same individuals who had defended the federal government's interests in direct opposition to Native peoples' rights. He (not we) compared the situation to that in which lawyers and others go from government to private industry. We asked him if he could understand that the history of NARF people moving over to Interior Department and Interior Department people moving over to NARF has the color of a "revolving door" policy by both parties and that people might be justly suspicious of that. He said, "people can take jobs wherever they want." He also indicated that the people who left NARF for the Interior Department did so with the hopes that they could exercise some influence from within government positions. He offered the "hired gun" theory of lawyers – that when they work for a client, they serve that client, and when they change clients, they change completely their positions. He did not discuss what hopes he thought Interior lawyers have when they come to work for NARF, whether they hope to "change NARF from within."

There are other elements of NARF's history which may be of interest to NARF's clients and potential clients. One of the NARF annual reports states that in 1973, NARF was responsible for "securing a funding base" and IRS tax status for an organization called the Native American Natural Resources Development Federation (NANDRF). They also take credit for setting up administrative offices in Denver for that organization. In other words, they practically created the organization. NANDRF was organized to implement "the orderly and systematic development of natural resources in tribal lands" to extract copper, coal, and uranium. In 1976, another report explains, NARF did some of the same favors for the Council of Energy Resource Tribes (CERT).

That information raises more questions about NARF. During the early days of the organization, (before the heavy influx of federal funds,) NARF was the law firm for the Traditional Hopis in their battle to stop the destruction of Black Mesa. The adversary in that case was the Hopi Tribal council which had signed the lease under which the Peabody Coal Company was operating. The major legal argument which the Traditional Hopis raised in the case was that the Hopi Tribal Council was illegal, an argument which the court refused to hear on the basis of the Sovereign Immunity doctrine. The Traditional Hopis and NARF lost that case.

We asked John Echohawk if there wasn't some kind of conflict in NARF's actions in representing the Traditional Hopis against the Hopi Tribal Council and then becoming the lawyer for CERT of which the HOpi Tribal Council was a leading member. He said that NARF had discussed a possible conflict of interest, but that the Hopi Tribal Council had joined CERT at a date after the Black Mesa lawsuit had ended. Therefore, he thought, there was no conflict.

We then asked him if he thought that, since NARF had worked so closely with the federal government and CERT, and since those organizations had as their program the development of natural resources in Indian country, that this history of representation might preclude NARF from representing any group which now wished to halt development. He said that he felt that NARF would not be deterred from representing a group opposed to development even though they had a pro-development history.

There is little question that NARF has a history of appearing to be on both sides of the fence at the same time. While NARF was defending the Traditional Hopis against a development scheme, they were also midwives to CERT, and had already been nursemaids to NANDRF. NARF apparently doesn't have any problems with the implications of "guilt by association." They worked closely with John Boyden in a Northern Ute matter at the time they were defending the Traditional Hopis. John Boyden is an attorney for the Hopi Tribal Council.

NARF Director John Echohawk maintains that all these seeming contradictions don't mean anything, that NARF does its best to provide the best legal service to Indians that they can. "WE've developed some power, some influence," he said. "And that's going to help them (Indian people) directly. We know how to get things done, and we do it.... We've represented a lot of Indian people. We'll just let the facts speak for themselves."

Most of NARF's clients seem to be unaware that their lawyers are funded by their adversary. We know of no clients to whom NARF has explained the canon of legal ethics which apply to that situation, and we know of none who have approved of NARF's use of federal funds to litigate their case. At least one NARF attorney has actually been giving people factually wrong information. (For more "facts" about NARF, please read the article on the Maine land claims settlement in this issue – Ed.) The facts seem to suggest that the law firm which a decade ago showed promise of becoming a prestigious law firm defending Native people's rights similar to the NAACP Legal Defense Program or the lawyer's guild has instead become a largely federally-funded group which has apparently committed blatant violations of the canon of legal ethics concerning the requirement of disclosure to clients of compensation from a potential adversary.

That fact should be a serious disappointment to Native people in the United States. NARF has been successful, however, in placing its people in high-level government positions, and in attracting government attorneys into its fold.

John Echohawk thinks that NARF's overall effort has been fruitful. "We think this thing (NARF) has been successful," he told us. The frightening thing is, ironically, maybe he's right about that.